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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-533

JESS H. HISQUIERDO,

Petitioner,

vs.

ANGELA HISQUIERDO,

Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF CALIFORNIA

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

This brief is submitted in response to the brief for the United States as Amicus Curiae.

In his Brief as Amicus Curiae, the Solicitor General concluded that the

Supreme Court of California erred in holding that Federal law permits the state to treat railroad retirement benefits as community property by relying upon Wissner v. Wissner, 338 U.S. 655, and upon his conclusion that Congress intended to exclude divorced wives from sharing in benefits through application of state community property law. This brief is directed to those points.

THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN WISSNER V. WISSNER.

The Solicitor General has suggested that the principle of Wissner may be controlling in light of 45 U.S.C. 231m which provides that annuities are

not "assignable or . . . subject to any tax or to garnishment, attachment, or to other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

The California Supreme Court noted in its opinion that the fundamental premise of Wissner was that Congress intended a serviceman to have an absolute right to change his beneficiary and that to require the designated beneficiary to pay over the proceeds of the policy to the widow would frustrate congressional intent.

The controlling section of the National Service Life Insurance Act (38 U.S.C. § 701 et. seq.) at issue in Wissner was 38 U.S.C. § 802 (g) which provided that the insured:

"Shall have the right to designate the beneficiary of the insurance [within a designated class] . . . and shall have the right to change the beneficiary or beneficiaries of such insurance without the consent of the beneficiary or beneficiaries."

Since Wissner, California has refused to follow the rule that Wissner established a rule that every federally created benefit must be separate property in the absence of clear congressional intent to the contrary. As was stated in the case of In re Marriage of Milhan 13 Cal.3d 129, 132, 117 Cal.Rptr. 810, "Wissner does not forbid the states from applying their community property laws to achieve an equitable distribution

of marital property, so long as the operation of those laws does not frustrate congressional intent."

CONGRESS DID NOT MANIFEST ANY INTENT TO PRECLUDE COMMUNITY PROPERTY STATES FROM EVALUATING RAILROAD RETIREMENT BENEFITS AS A COMMUNITY ASSET.

The United States suggests on pages 10 and 11 of its brief that there is a possible hardship to divorced spouses if they are denied a community interest in railroad retirement benefits that would not apply to spouses of workers covered by private plans, but that the Railroad Retirement Act read in light of the principles set out in

Wissner indicates the Congress sought to exclude divorced wives from sharing in railroad retirement benefits through application of state community property law. However, Wissner was decided long after enactment of the Railroad Retirement Act of 1937 and there is no reported history of the legislation which supports the argument that Congress intentionally sought to exclude divorced wives from sharing in railroad retirement benefits.

The most comprehensive analysis of the Railroad Retirement Act of 1937, 45 U.S.C. § 228, et. seq., as voted upon by Congress in 1935 is a House of Representatives Hearing Report, Committee on Interstate and Foreign Commerce, Retirement System for Employees of Carriers Subject to the Interstate Commerce Act, H. R. Rep. No. 1711, 74th

Cong., 1st Sess. (1935). The purpose of the act as explained by the Comittee in that report was to improve the relationship between employer and employee and to enable employees to retire with peace of mind and physical comfort. This report made no mention of the lack of benefits provided for a divorced spouse, nor does it make any reference to community property states or evidence any indication that Congress intended railroad retirement benefits to be separate property.

CALIFORNIA COURTS HAVE ALREADY HELD THAT CIVIL SERVICE PENSIONS AND MILITARY RETIREMENT BENEFITS ARE COMMUNITY ASSETS.

Although the United States suggests on page 13 that the principles

that led the California Supreme Court to conclude that railroad retirement benefits are community property may lead it to the same conclusion about other federal benefits affecting many more people, California courts have already done so.

It is established law in California that federal military retirement benefits are community property, In re Marriage of Fithian, 10 Cal.3d 592, 111 Cal.Rptr. 369, cert. denied at 419 U.S. 825, and that federal civil service retirement benefits are community property, In re Marriage of Peterson, 41 Cal.App.3d 642, 115 Cal.Rptr. 184. California law is clear that retirement benefits are community property whether they derive from a state, federal or private source, Smith v. Lewis, 13 Cal.3d 349, 355, 118 Cal.Rptr. 621.

In Fithian, the California Supreme Court noted a lack of legislative background into whether Congress intended military retirement pay to be separate or community property or whether the treatment of such benefits as community property circumvents this congressional scheme, 10 Cal.3d at 599. The Court also noted that it was anomalous that in light of Congress' intention to create an annuity plan to specifically support a serviceman's widow, it intentionally made no provisions to support a serviceman's divorced wife.

At page 600, the court concluded: "It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and to omit to do so for ex-wives who can rely on state

family law concepts of support, alimony, and community property for a source of income."

With regard to social security benefits, the Court of Appeal for the First District of California in the recent case of In re Marriage of Nizenkoff 65 Cal.App.3d 136, 135 Cal.Rptr. 189, cited by Amicus Curiae on page 10, declined to hold that social security benefits are a divisible community asset. One of the primary bases for the decision was the indication that Congress had considered the termination of marital 'relationships by divorce and expressly set forth for a method of protecting the interests of the divorced wife under the social security system. (See 45 U.S.C. (and supplement V) 402 (b) (1).) It is acknowledged however, that

there are no provisions under the Railroad Retirement Act for benefits to be payable to a divorced spouse.

RECENT AMENDMENTS TO THE SOCIAL SECURITY ACT DO NOT MANDATE THAT THE CALIFORNIA SUPREME COURT DECISION BE REVERSED OR THAT THIS CASE BE REMANDED.

The only statute contained within the Railroad Retirement Act relating to garnishment of benefits is 45 U.S.C. 231m which provides that the Railroad Retirement annuities are not subject to tax or garnishment attachment or other legal process. The recent exception to this statute cited in the Amicus brief is 42 U.S.C. 659, effective

January 1, 1975 which permits garnishment of moneys due from or payable by the United States (including Railroad Retirement Act benefits) to satisfy obligations for child support or alimony. Under this statute, service of legal process can be made upon an appropriate agent of the United States for enforcement of an individual's obligation to provide child support or alimony payments.

The definitional statute, 42 U.S.C. 662, amended May 23, 1977 defines alimony as "periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual and (subject to and in accordance with the State law) includes but is not imited to, separate maintenance, alimony pendente light, maintenance, and spousal

support;". The last sentence of subdivision (c) provides that alimony does not include the transfer of property or its value to a spouse in compliance with any community property division. Under these statutes a spouse can garnish funds to be received from the United States to pay child support or alimony but not for the enforcement of a community property division.

Respondent submits that these recent statutes do not evidence any intent that Congress, more than 30 years ago when it adopted the Railroad Retirement Act of 1937 intended to preclude states which recognize community property, from attempting to equalize the property upon dissolution of marriage by categorizing railroad retirement benefits as a community asset. This anti-garnishment statute and its exception

appear to apply equally to civil service retirement benefits and military retirement benefits which California has already recognized to be a divisible asset upon the dissolution of a marriage. (Fithian and Peterson, supra.)

The fact that the Congress has deemed it important to permit garnishment of retirement benefits for the satisfaction of child support and alimony obligations certainly does not not imply that Congress has now determined to prohibit states from protecting the rights of divorced spouses who can rely on state law.

It is difficult to conceive that Congress in enacting the recent legislation relating to garnishment, intended to permit husbands covered under the Railroad Retirement Act to divorce their wives of many years near

the time the husbands are entitled to receive benefits, and to deny a wife due process by prohibiting the states from enabling the wife to share in those benefits in an amount based on the number of years of service performed during the marriage. While it is suggested that the wife can still rely on the state concept of alimony, that is not the case herein where the trial court did not award the respondent any spousal support.

CONCLUSION

The decision of the California Supreme Court is only one part of California's scheme pertaining to dissolution of marriage and the division of property upon dissolution. Niether the petition

nor the Amicus Curiae Brief have set forth any statute or legislative history evidencing the intent of Congress to make railroad retirement benefits separate property or to prohibit the states from applying their community property laws to effectuate an orderly disposition of property upon dissolution of marriage.

The only persons affected by this decision are railroad workers and their spouses, whose marriages will be dissolved in the State of California. California has treated nearly every federal, state and private pension as community property in assessing the value of community assets for appropriate distribution on dissolution. It is, therefore, submitted that this case does not require the protection of a federal right by undue interference with a

legitimate determination of the California Supreme Court of the rights of California residents.

Respectfully submitted,

By Ray C. Bennett
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